hold that the excluded comparable sales were admissible. A considerable portion of its opinion is devoted to pointing out the many dissimilarities between the five excluded sales offered by Petitioners' and the property being condemned. This discussion precedes, in the written opinion of the Court, its holding that no abuse of discretion on the part of the trial court had been shown.

STATEMENT OF THE CASE

Respondent believes that additional facts from the record of this case other than those related in the Petition, would be helpful to a full understanding of the trial court's rulings.

By stipulation of all parties prior to the introduction of any evidence in the trial court, damages to Petitioners' property not being condemned were waived and the only issue to be decided was the market value of the land actually condemned (S. F. 3). It is believed that this circumstance is a strong indication that any sale of a portion of Petitioners' remainder, subsequent to the date of taking reflects an enhancement brought about by the knowledge of the location of the new interstate highway.

Petitioners originally owned 439 acres of raw, undeveloped land, which had been purchased in 1948 (S. F. 10). At the date of taking no development had taken place on the property other than approximately 2.75 acres at the northeast corner of the new right-of-way herein involved and Odom Road on which was located a church and pastor's residence (S. F. 25). This had been conveyed by Petitioners in 1960 for such use (S. F. 26, 66).

As shown by Defendant's Exhibit No. 1, the subject property is immediately north of the Fort Worth city limits, west of Saginaw and east of Haltom City. It is not within any city (S. F. 22-24). The property is bounded on the east by Sylvania Road, on the west by Old Denton Road (also known as Deen Road), on the south by two large tracts of undeveloped land (S. F. 33), and on the north by a residential subdivision, Melody Hills, and another large, undeveloped tract of land (S. F. 24-29).

The property is generally in an area to the north and west of the Cotton Belt Railway tracks and north and east of the Fort Worth and Denver or Burlington tracks (DX-1). These tracks intersect generally south of Appellant's property (DX-1).

During the course of the trial a sharp issue was drawn concerning the drainage of the subject tract, and the availability of sewage (S. F. 31-40). Petitioner Bruner testified that a small tract in the corner of the south side of his property would drain by gravity flow to the south and into the Marine Creek drainage area and into the sewer connection already in place (S. F. 42). This tract is that 21 acre portion in the southwest corner conveyed subsequent to the taking by Petitioner Bruner to other parties (S. F. 104). Petitioners' witness Key testified out of the presence of the jury, that the 21 acre portion conveyed by Bruner sits on approximately the highest point of his ownership (S. F. 104).

The property being valued by the jury drains into the Little Fossil Creek drainage area (S. F. 142). The land to the south and west of Petitioners' property, and across the railroad tracks from it, is in the city of Fort Worth, drains to the south and is served by

the city sewage lines. The closest points these lines come to Petitioners' property were indicated on Defendant's Exhibit 1 by Bruner himself (S. F. 34 and 41).

Petitioners offered an expert engineering witness, and are bound by his testimony, James B. Miller, who is employed by the City of Fort Worth. He testified that the land being taken is in the Little Fossil Creek drainage area and that he had studied the most expedient way to provide sewer service for the 33.881 acres being taken in this case (S. F. 142). The most expedient way would be the installation of a package treatment plant, which would afford the opportunity of extending main service from such plant on Fossil Creek to whatever portion of the property desired to serve (S. F. 142). The land being taken could be served by the plant (S. F. 142). The plant would be built by the developer (S. F. 142-143), the number of acres to be served would depend on the size plant and they had discussed a plant that would serve 50 acres and cost $40,000.00 (S. F. 143). It would cost the developer another $30,000.00 to get the mains to the border of the tract (S. F. 143-144).

Petitioners' witness further testified that he had checked into what would be necessary to provide water service for the same 50 acres (S. F. 145). It would cost $7,500.00 to extend water service to the southwest corner of the whole tract and another $20,000.00 to extend it 3,200 feet more to the property in question (S. F. 145).

This evidence, offered by Petitioners, and undisputed in the record, shows it would cost approximately $97,500.00 to make water and sewage available to a 50 acre tract of which the 33.881 acre strip being taken is a part.

Although Petitioners stated that municipal sewage facilities come within 3,200 feet of the subject property, the record shows that no such facilities can feasibly be extended from the present location over the ridge, or over the 640 foot contour, down into the Little Fossil Creek drainage area so as to serve the 33.881 acres being taken. On the contrary, special facilities costing $70,000.00 would have to be provided by the developer to bring sewage mains *to the border of the tract* (S. F. 143).

The City of Fort Worth has constructed additional sewer lines at two points on the subject property. However, they were built under the new interstate highway *to tie in with future plans,* not connected at the present, but to prevent tearing up the highway after construction (S. F. 324-326).

It should also be noticed that the property being taken by the jury is 3,300 feet from the Rock Island Railroad at its nearest point (PX-1). There is no evidence in the record as to how much it would cost to bring tracks over that distance to the subject property in order to give it the trackage that already abuts Petitioners' claimed comparable sales.

ARGUMENT AND AUTHORITIES

QUESTION NO. 1

The Texas Court of Civil Appeals in this case correctly stated the Texas rule that a discretion is lodged in the trial court relative to whether evidence tendered purporting to show sales of comparable property to that condemned shall or shall not be admitted. *Chaney v. Coleman,* 77 Tex. 100, 13 S.W. 850 (1890) at 13 S.W.

851 and *State v. Oakley,* 163 Tex. 463, 356 S.W.2d 909 (1962) at 356 S.W.2d 914. This rule, sometimes referred to as the "Massachusetts" rule, prevails in the majority of American jurisdictions. See Annotation, 118 A.L.R. 869 at page 904 (1939). In fact, by their insistance that the rule granting such discretion to the trial court violates their constitutional rights, Petitioners ask this Court to impose more stringent restrictions upon a Texas trial court than are placed on the Federal trial courts. It has been consistently held that the matter of the range of inquiry allowed as to comparable sales in an eminent domain case is to a considerable extent within the discretion of the trial judge. *Foster v. United States,* 145 F.2d 873 (C.C.A. 8th 1944); *United States v. Block,* 160 F.2d 604 (C.C.A. 9th 1947); *Stephens v. United States,* 235 F.2d 467 (C.C.A. 5th 1956).

The holding of the Texas Court of Civil Appeals in this case differs in no regard from the effect of any situation where the trial court is granted discretionary power in admitting and excluding evidence. The given area may be divided into three general categories. On the one hand the proffered evidence may be held to be admissible as a matter of law, and the trial judge guilty of a clear abuse of discretion if he excludes it. On the other hand the proffered evidence may be held to be inadmissible, also as a matter of law, and the trial judge guilty of an abuse of discretion should he admit it. In between these two extremes is the area wherein the oft-quoted term, sound judicial discretion, comes into play. In this area, as the Texas Court of Civil Appeals ruled, the trial judge cannot be held guilty of an abuse of discretion whichever way he might rule. This last is the area where reasonable minds might

differ and where the Appellate Court properly refuses to substitute its judgment for that of the trial court. *International Paper Company v. United States*, 227 F.2d 201 (C.C.A. 5th 1955).

Before it ruled that the trial court in this case did not abuse its discretion in excluding the purported comparable sales, the Texas Court of Civil Appeals outlined some of the factors which might be used to test the comparability of the proffered sales to Petitioners' property and which showed the marked dissimilarities:

> "Such 21 acre tract and the other four tracts as to which the condemnees tendered evidence as comparable sales, or sales of comparable property, in support of the witnesses' stated opinion on the market value of the land condemned, were either adjacent or near-adjacent to existing railroad trackage. The condemned property was over a quarter of a mile removed therefrom. Part of it was at a considerably greater distance. Testimony from an agent of the railroad company, however, was to the effect that trackage would be made available to said portion of condemnees' total acreage as and when it might be developed industrially. The same thing applied to all of condemnees' property. There was no issue made, but the evidence undisputably established that the highest and best use of all of the condemnees' property, including that taken, was for industrial development. As of the date condemnees' land was taken lack of convenient availability of water, sewer and gas hampered its development as such. It was shown that the condition will be remedied in the not too distant future. All the tracts as to which condemnees tendered evidence as comparable property either have some or all such utilities, or will probably have such at an earlier time than that condemned.

> It was established by the evidence that a considerable sum would be necessary to be expended in order to have such services extended to said area. All such as presently exist lie south of the nearest trackage." *Bruner v. State,* 391 S.W.2d at page 154.

It is submitted that the factors above support the trial court's ruling in this case. Reference to Respondent's Statement of the Case at the beginning of this brief will show what those factors of dissimilarity mean in terms of comparing the market value of the offered sales to Petitioners' land.

Petitioners' preoccupation with the fact that the sales offered by the State of Texas in this case, and admitted by the trial judge, were further removed from Petitioners' property than their offered sales, which were excluded, is believed of little significance. In terms of city sewage, utilities and railroad trackage available and size, they were more comparable to Petitioners' property than the excluded sales.

> "The character of such land situated several miles from land condemned may well be more comparable than that within a few hundred feet. This is a question to be decided in the first instance and in his discretion by the trial court." *Knollman v. United States,* 214 F.2d 106 at page 109 (C.C.A. 6th 1954).

Petitioners have the constitutional right to just compensation when their property is taken by the State under the power of eminent domain, which they received in the court below. In Texas, unlike some other jurisdictions including the Federal system, when property is being condemned by the United States, Petitioners have the constitutional right to a jury trial, which

they also received below. However, Petitioners have cited no authority to this court, and it is believed none exists, granting to them the constitutional right to introduce in that jury trial all evidence offered by them without regard to tested rules of admissibility. It is submitted that no question is presented in this case that Petitioners were forced to prove that their evidence was admissible beyond a reasonable doubt. What they failed to show was that the trial court abused its discretion in excluding Petitioners' sales. No constitutional issue of substance is presented by Petitioners' first question.

QUESTION NO. 2

Petitioners' second question poses a purely rhetorical issue without basis in fact as applied to their case. The Texas Court of Civil Appeals did not assume any *power to exclude admissible evidence.* It held that no ground existed for overturning the holding of the trial court that the proffered evidence was inadmissible.

As is pointed out in the discussion under Question No. 1, above, the Texas Appellate Court first pointed out the many features of dissimilarity between the sales offered by Petitioners and then held that this evidence fell within the area of sound judicial discretion. The Texas Court of Civil Appeals properly chose not to substitute its judgment in the matter for that of the trial court. *International Paper Company v. United States,* 227 F.2d 201 (C.C.A. 5th 1955). The Texas Court obviously viewed the question in much the same light as did the United States Court of Appeals for the Fifth Circuit in a similar situation.

". . . To facilitate the ultimate inquiry of fair market value of a landowner's property at the date of taking, we think some reasonable latitude and discretion in the acceptance or rejection of all such testimony must of necessity be allowed the commission and district court, especially where, as here, much of the evidence admitted was not so remote or immaterial upon that issue as to require its exclusion without objection, and that excluded was not so clearly admissible as would show prejudice and warrant a redetermination." *Stephens v. United States,* 235 F.2d 467 at page 471 (C.C.A. 5th 1956).

The only item of evidence excluded by the trial court and held to be admissible by the Texas Court of Civil Appeals was the opinion of value of Petitioners' witness L. G. Key. This was held to be error, but not reversible under the Texas "Harmless Error" rule, which provides in part:

". . . that a judgment shall not be reversed on appeal and a new trial ordered because of an error of law on the part of the trial court unless the Appellate court shall be of the opinion that the error complained of amounted to such a denial of the rights of the Appellant as was reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case, . . ." Tex. Rules Civ. Proc. Rule 434. (quoted fully at Page A-5).

The Texas Court of Civil Appeals pointed out that Petitioner Bruner and two other expert witnesses had testified as to value on behalf of Petitioners. Petitioner Bruner testified to a value of $3,000.00 per acre (S.F. 52). Petitioners' witnesses Carb and Wade, testified to values of $2,500.00, $2,000.00 and $1,500.00 per acre

for respective portions of the land being taken (S.F. 152-153 and 315, respectively). The witness Key's opinion, shown by bill of exception to be $2,500.00 per acre (S.F. 115), would have been higher than Petitioners' expert witnesses and lower than the opinion of the Petitioner Bruner himself. As such it would have been merely cumulative and clearly fell within the scope of Tex. Rules Civ. Proc. Rule 434, noted above.

It is submitted that no violation of Petitioners' constitutional rights is shown under the purely abstract proposition contained in their second question.

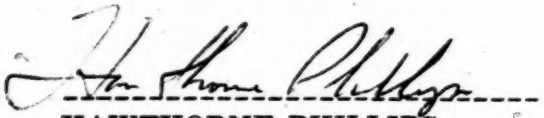
CONCLUSION

For the reasons set out above it is respectfully submitted that Petitioners have failed to demonstrate that this Honorable Court has jurisdiction in this cause. It is further submitted that Petitioners do not present any Federal question of substance and neither do they demonstrate any violation of their constitutional rights in the rulings of the trial court and the Texas Court of Civil Appeals below. Respondent respectfully prays that the Application for Writ of Certiorari be denied.

Respectfully submitted,

WAGGONER CARR
Attorney General of Texas

HAWTHORNE PHILLIPS
T. B. WRIGHT
CARROLL R. GRAHAM
FRED M. TALKINGTON
F. WILLIAM COLBURN



HAWTHORNE PHILLIPS
Assistant Attorney General

P. O. Box 5075
West Austin Station
Austin, Texas

ATTORNEYS FOR RESPONDENT,
THE STATE OF TEXAS

CERTIFICATE OF SERVICE

I, Hawthorne Phillips, Assistant Attorney General of Texas, am a member of the Bar of the Supreme Court of the United States, and I do now enter my appearance in the Supreme Court of the United States in the above captioned cause, in behalf of Respondent; I do further certify that copies of the foregoing brief have been forwarded by United States Mail, First Class, Postage Prepaid, to Heard L. Floore, 1401 West Lancaster, Fort Worth, Texas 76102 and Harold D. Hammett, Simon and Simon, 816 First National Bank Building, Fort Worth, Texas 76102, attorneys for Petitioners.

Hawthorne Phillips

HAWTHORNE PHILLIPS
Assistant Attorney General
of Texas

APPLICABLE TEXAS RULES OF CIVIL PROCEDURE

Rule 320. Motion

"New trials may be granted and judgment set aside on motion for good cause, on such terms as the court shall direct. Each such motion shall be in writing and signed by the party or his attorney and shall specify each ground on which it is founded, and no ground not specified shall be considered. As amended by order of July 20, 1954, effective Jan. 1, 1955."

Rule 324. Prerequisites of Appeal

"In all cases tried in the county or district court, where parties desire to appeal from a judgment of the trial court, a motion for new trial shall be filed as a prerequisite to appeal; provided that neither a motion for new trial nor an assignment therein shall be a prerequisite to the right to complain on appeal of the action of the court in giving a peremptory instruction, or in withdrawing the case from the jury and rendering judgment, or in rendering or refusing to render judgment non obstante veredicto or notwithstanding the finding of the jury on one or more special issues, or in overruling a motion for judgment on the verdict made by the party who becomes appellant; nor shall a motion for new trial be required in a non-jury case or in a case where the appeal is based upon some error of the trial court arising after its action upon the motion for new trial. But motion for new trial shall be a necessary prerequisite to consideration of the complaints mentioned in Rule 325. When judgment is rendered non obstante veredicto or notwithstanding the finding of the jury on one or more special issues, the appellee may bring forward by cross-point contained in his

brief filed in the Court of Civil Appeals any ground which would have vitiated the verdict or would have prevented an affirmance of the judgment had one been entered by the trial court in harmony with the verdict, including although not limited to the ground that one or more of a jury's findings have insufficient support in the evidence or are against the overwhelming preponderance of the evidence as a matter of fact, and the ground that the verdict and judgment based thereon should be set aside because of improper argument of counsel. In the event appellee assigns error by cross-point based upon an alleged improper argument of counsel, he shall support the same by proper bill of exceptions. The failure to bring forward by cross-points such grounds as would vitiate the verdict shall be deemed a waiver thereof, save and except such grounds as require the taking of evidence in addition to that adduced upon the trial of the cause. A motion for new trial shall not be necessary in behalf of appellee where he does not complain of the judgment or a part thereof. As amended by order of March 19, 1957, effective Sept. 1, 1957; April 12, 1962, effective Sept. 1, 1962."

Rule 329b. District and County Court Cases

"The following rules shall be applicable to motions for new trial filed in all district and county courts:

1. A motion for new trial when required shall be filed within ten (10) days after the judgment or other order complained of is rendered.

2. An original motion for new trial filed within said (10) day period may be amended by leave of the court. Said amended motion shall be filed before the original motion is acted upon and within twenty (20) days after the original motion for

new trial is filed. Not more than one amended motion for new trial may be filed.

3. All motions and amended motions for new trial must be determined within not exceeding forty-five (45) days after the original or amended motion is filed, unless by one or more successive written agreements of the parties in the case filed with the clerk of the court the decision of the motion is postponed to a day certain specifically set out in any such agreement. Any such day certain shall not be more than ninety (90) days after such original or amended motion is filed.

4. It shall be the duty of the proponent of an original or amended motion for new trial to present the same to the court within thirty (30) days after the same is filed. However, at the discretion of the judge, an original motion or amended motion for new trial may be presented or hearing thereon completed after such thirty (30) day period. Such delayed hearing shall not operate to extend the time within which the original or amended motion must be determined, unless such time be extended by agrement as provided for in the preceding subdivision of this Rule. In the event an original motion or amended motion for new trial be not presented within thirty (30) days after the date of the filing thereof, and the judge in his discretion refuses to consider the same or refuses to hear evidence relating thereto, such motion will be overruled by operation of law forty-five (45) days after the same is filed, unless disposed of by an order rendered on or before said date. In the event the decision of the motion is postponed by any written agreement as provided in subdivision 3 of this Rule then any such original or amended motion, if not determined by the court, will be overruled by operation of law ninety (90) days after the same is filed or on the latest day certain agreed upon, whichever occurs first.

5. Judgments shall become final after the expiration of thirty (30) days after the date of rendition of judgment or order overruling an original or amended motion for new trial. After the expiration of thirty (30) days from the date the judgment is rendered or motion for new trial overruled, the judgment cannot be set aside except by bill of review for sufficient cause, filed within the time allowed by law. The failure of a party to file a motion for new trial within the ten (10) day period prescribed in subdivision (1) of this rule shall not deprive the court of jurisdiction to set aside a judgment rendered by it, provided such action be taken within thirty (30) days after the judgment is rendered. The filing of a motion for new trial after ten (10) days have expired and before thirty (30) days have expired since the rendition of the judgment shall not operate to extend the court's jurisdiction over the judgment for a period of more than thirty days from the date of the rendition of judgment.

6. In district courts and in county courts having continuous terms, that is, successive terms in a county throughout the year, without more than two days intervening between any such terms, the following rules shall apply:

(a) A motion for new trial filed during one term of court may be heard and acted upon at the next term of court.

(b) No motion for new trial shall be considered as waived or overruled because not acted upon at the term of court at which it was filed, but may be acted upon at any time within the next term of court agreeable to the provisions of this Rule 329b.

(c) Judgments of such courts shall become as final after the expiration of thirty (30) days after the date of judgment or after a motion for new

trial is overruled as if the term of court had expired.

(7) In county courts which do not have continuous terms as defined above, the same rules shall apply except that whenever the last day of any period of time specified in this Rule 329b shall fall on a day when such a court is in vacation, such period shall run to the fifth day of the next term. Promulgated by order of July 20, 1954, effective Jan. 1, 1955; and as amended by order of July 26, 1960, effective Jan. 1, 1961."

Rule 374. Assignment of Error

"The motion for new trial, when required to be filed under these rules, shall constitute the assignments of error on appeal or writ of error. A ground of error not distinctly set forth in the motion for new trial, in cases where a motion for new trial is required shall be considered as waived. Complaint of the action of the court on all matters arising under circumstances where no motion for new trial is required by these rules, if relied upon on appeal, shall be included in the statement of points in the brief as hereinafter provided, and in such cases no assignments of error shall be necessary. Amended by Order of March 31, 1941."

Rule 434. If Judgment Reversed

"When the judgment or decree of the court below shall be reversed, the court shall proceed to render such judgment or decree as the court below should have rendered, except when it is necessary that some matter of fact be ascertained or the damage to be assessed or the matter to be decreed is uncertain, in either of which cases the cause shall be remanded for a new trial.

Provided, first, that no judgment shall be reversed on appeal and a new trial ordered in any

cause on the ground that the trial court has committed an error of law in the course of the trial, unless the appellate court shall be of the opinion that the error complained of amounted to such a denial of the rights of the appellant as was reasonable calculated to cause and probably did cause the rendition of an improper judgment in the case, or was such as probably prevented the appellant from making a proper presentation of the case to the appellate court; and if it appear to the court that the error affects a part only of the matter in controversy, and the issues are severable, the judgment shall only be reversed and a new trial ordered as to that part affected by such error.

Provided, second, that if the erroneous action or failure or refusal of the trial judge to act shall prevent the proper presentation of a cause to the Court of Civil Appeals, and be such as may be corrected by the judge of the trial court, then the judgment shall not be reversed for such error, but the appellate court shall direct the said judge to correct the error, and thereafter the Court of Civil Appeals shall proceed is if such erroneous action or failure to act had not occurred. Amended by Order of March 31, 1941."

Rule 469. Requisites of Application

"The fact that the docket of the Supreme Court is overcrowded makes its imperative that applications for writs of error be as brief as possible. The attorneys are urged to co-operate with the Court in this respect, in order to reduce the work of the Court. The respondent is urged to file a reply.

The application for writ of error shall be addressed to "The Supreme Court of Texas," and shall state the name of the party or parties applying for the writ. The parties shall be designated as "Petitioner" and "Respondent." The application shall contain the following:

(a) Statement of the Case. The opinion of the Court of Civil Appeals will always be read before the application is considered; consequently the application should not contain matter that is found in the opinion of the Court of Civil Appeals. Ordinarily it should contain only a statement of the general nature of the suit,—for instance, whether it is a suit for damages, on a note, or in trespass to try title, and that the statement as contained in the opinion of the Court of Civil Appeals is correct, except in the particulars pointed out. Example: "This is a suit for damages in excess of $1000.00 for personal injuries growing out of an automobile collision. The opinion of the Court of Civil Appeals correctly states the nature and result of the suit, except in the following particulars: (If any.)" Such statement should seldom exceed one-half page. The details of the case should be reserved to be stated in connection with the points to which they are pertinent.

(b) Statement of Jurisdiction. Except in those cases in which the jurisdiction of the Court depends on a conflict of decisions under Subdivision 2 of Article 1728, the petition should merely state that the Supreme Court has jurisdiction under a particular subdivision of Article 1728. Example: "The Supreme Court has jurisdiction of this suit under Subdivision 6 of Article 1728." Where jurisdiction of the Supreme Court depends on a conflict of decisions, the conflict on the question of law should be clearly and plainly stated.

(c) Points of Error. The points of error relied upon, separately numbered, shall be stated in short form and without argument and be germane to some assignment of error in the motion for new trial in the trial court, or otherwise saved in the statement of points as authorized by the rules, and likewise assigned as error in the motion for re-

hearing in the Court of Civil Appeals, and where Rule 377-a has been employed, saved in the statement there authorized. If the ruling complained of originated in the Court of Civil Appeals, it must also be assigned as error in the motion for rehearing in said court.

(d) Brief of the Argument. The brief of the argument may present separately, or grouped if germane, the points of error relied upon for reversal, the argument to include such pertinent statements from the record as may be requisite, together with page references and such discussion of the authorities as is deemed necessary to make clear the points of error complained of. The opinion of the Court of Civil Appeals will be considered with the application, and statements therein, if accepted by counsel as correct, need not be repeated.

(e) Subject Index. The application shall contain at the front thereof a subject index with page references where the discussion of each point relied upon may be found and also a list of authorities alphabetically arranged, together with reference to the pages of the application where the same are cited.

(f) If any brief or application for writ of error is unnecessarily lengthy or not prepared in conformity with these rules, the court may require same to be redrawn. As amended by order of April 12, 1962, effective Sept. 1, 1962."